Supreme Court, U.S.
FILED
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IN THE UNITED STATES SUPREME COURT

DOCKET NO.

OCTOBER, 1998 TERM

UNITED STATES OF AMERICA

VS.

MATTHEW BROZYNA,

PETITIONER

BRIEF AND APPENDIX FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE

Did the Third Circuit rule in conflict with the Ninth Circuit in United States v. Delgado, 4 F.3d 780 (9th Cir. 1993), by affirming the District Court's finding that Petitioner's former counsel did not render ineffective counsel for failing to challenge the continuing criminal enterprise conviction for lack of numerosity?

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PREVIOUS ORDERS AND DECISIONS

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STATEMENT OF JURISDICTION

The Petitioner seeks Certiorari on the grounds that the Third Circuit's decision (No. 97-1326) on April 29, 1998, to affirm the District Court order to deny in part and vacate in part the conviction of the Appellant is in conflict with the Ninth Circuit in United States v. Delgado, 4 F.3d 780 (9th Cir. 1993). This jurisdiction is pursuant to Sup. Ct. R. 10(a).

PERTINENT STATUTES

21 U.S.C. § 848.

A conviction under 21 U.S.C. § 848, requires the following: (1) A felony violation of the federal narcotics law; (2) As part of the continuing series of violations; (3) In concert with five or more persons; (4) For whom the defendant "occupies a position of organizer, supervisory position, or any other position of management"; and (5) from which the defendant derives substantial income or resources.

21 U.S.C. Sec. 848 (d) (1972 Edition of Statute).

It is the fourth element that is the subject of this argument

FACTS OF THE CASE

The Petitioner's conviction is the result of a reverse-sting orchestrated by members of the Federal Drug Enforcement Agency. Prior to his arrest, Federal Drug Enforcement Agency Agent Ted Weed and other agents arranged to meet with the Petitioner on several occasions to discuss marijuana purchases. During this time the agents were also in contact with Bruce Gittleman, who would later become one of Petitioner's co-defendants. The agents were posing as major suppliers of marijuana, with warehouses filled with thousands of pounds of marijuana that they wished to sell in bulk. In fact, at trial Agent Weed testified to several aborted attempts to sell Mr. Brozyna marijuana because Mr. Brozyna was unable to secure the required funds. Indeed, during one such meeting, Mr. Brozyna explained that he could only purchase a mere thirty (30) pounds of marijuana which exhausted his monetary resources, rather than provide the $800,000.00 that the agents demanded for the purchase of the five tons of marijuana. Mr. Brozyna told Agent Weed that he knew of different buyers, primarily from Philadelphia and the New York City areas, who could afford such a purchase. When the agents agreed, Mr. Brozyna brought in people who would later become Mr. Brozyna's co-defendant and whom the government would allege constituted the numerosity element of 21 U.S. C. § 848: John Kaye, Phillip D'Agostino, Dale Gregg, Arthur Hanman, and Edward Gregg,
After rejecting two other locations, the DEA agents selected a Bristol, Pennsylvania warehouse as the sale location. Co-defendant

Dale Gregg arrived at the location first, selected the bales of marijuana of the highest quality, and then left to secure funds for that purchase. Co-defendant Arthur Hanman, a driver for another buyer, had brought $480,000 in a beer box, which was a down payment to purchase 3,000 pounds of marijuana. As the marijuana was being loaded onto the truck, the agents ended the sting operation and arrested Brozyna, Gittleman and Hanman. Edward Gregg, Dale Gregg's brother, had been instructed to deliver an additional $200,000.00 down payment to an unknown agent in Miami and was arrested later that day.

On March 18, 1985, the Petitioner Matthew Brozyna was convicted of a continuing criminal enterprise (hereinafter "CCE") and other Federal possession and distribution of marijuana charges. The Petitioner was sentenced to thirty years of prison without parole on the CCE charge along with other concurrent terms. The Petitioner filed a direct appeal on this conviction which was affirmed by the Third Circuit on March 25, 1988. See United States v. Matthew Brozyna, No. 87-1436 (3d Cir. March 25, 1988) (unpublished).

Thereafter, the Petitioner filed a Petition to Vacate, Set Aside, and / or Modify a Judgment pursuant to 28 U.S.C. 2255. This motion was denied in part and granted in part by Judge Thomas N. O'Neill, Jr., D.J. on March 26, 1997. As part of that ruling, the conspiracy sentence was vacated. The Petitioner appealed Judge O'Neill's decision. On April 29, 1998, the Court of Appeals for the Third Circuit affirmed Judge O'Neill's Order. The Petitioner is seeking certiorari

of that decision. On July 28, 1998, Justice Souter granted the Petitioner's request for a thirty day extension to file the Petition for Certiorari.

ARGUMENT

THE THIRD CIRCUITS ERRED IN AFFRIMING THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE MANAGEMENT ELEMENT OF PETITIONER'S CCE CONVICTION AND IGNORING *STATE V. DELGADO, 4 F.3d 780 (9TH CIR. 1993).*

In *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984),* the Supreme Court set a two-pronged standard for determining when the assistance of counsel is Constitutionally ineffective. A defendant arguing such a claim must demonstrate: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 669. In evaluating the first prong, the question is whether counsel's performance was reasonable under all the circumstances. *Strickland, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L.Ed. 2d at 694.* In *Lockhart v. Fretwell, 506 U.S. 364, 372 (1993),* the Supreme Court modified the prejudice prong of *Strickland,* requiring that counsel's errors "render[ed] the result . . . unreliable . . . . ." The Petitioner submits that Mr. Brozyna's direct appeal and trial counsel assistance was ineffective for failing to argue that the government had not established that Matthew Brozyna managed five or more people pursuant to 21 U.S.C. § 848.

The Lower Court affirmed the Magistrate Judge's finding that this element was raised on appeal. The Petitioner submits that this

finding is incorrect since the trial and direct appeal argument did not specifically attack the 848(4) element, but rather simply argued that the government had not presented any evidence other than that manufactured by the government agents.

Trial and appellate counsel omitted any argument to the numerosity element despite a plethora of case law supporting the position that a conviction under 848 requires supervision or management of at least five individuals. In *United States v. Jerome, 942 F.2d 1328, 1331 (9th Cir. 1991)*, the 9th Circuit held that the organizer under 848 must **"exercise some sort of managerial responsibility. One does not qualify if one simply sets up a system of supply."** *citing United States v. Apodaca, 843 F.2d 421, 426, (10th Cir. 1988), cert. denied, 488 U.S. 932, 709 S. Ct. 325, 102 L.Ed 2d 342 (1984)* (emphasis added). An 848 organizer is also described with the following analogy:

> Every legitimate retail store makes arrangements with its regular suppliers. In one sense it may be said to organize its suppliers. Surely not in the sense of being the manager of its suppliers.
>
> To be an organizer more is required than being a steady customer.

United States v. Jerome, 942 F.2d at 1331 (9th Cir. 1991).

Apodaca also noted that the statute requires that the defendant must occupy some managerial position with respect to five or more persons. *843 F.2d at 426.* "The five

others must participate in such a way so that they could be said to have fallen under the accused's managerial authority." *United States v. Jones*, *801 F.2d 304, 308 (8th Cir. 1986) (citations omitted)*.

However, the case with the greatest value as precedent in this matter is *United States v. Delgado*, *4 F.3d 780 (9th Cir. 1993)*. *Delgado* held that the language of 848 should be construed as that language is used in the business community and among the general public. *Delgado*, *4 F.3d at 785*. This position is consistent with those taken by the Second, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits that the terms "organizer", "supervisor" and "manager" be given their plain "everyday" or business meanings. *See, i.e., United States v. Butler* *885 F.2d 95 (4th Cir. 1989)*; *Apodaca*, *supra at 425-426*; *United States v. Moya-Gamez*, *860 F.2d 706 (7th Cir. 1988)*; *United States v. Oberski*, *734 F.2d 1030, 1032 (5th Cir. 1984)*; *United States v. Mannino*, *635 F.2d 110, 117 (2d Cir. 1980)*. In construing these terms, the Court in *Delgado*, following the Court's lead in *United States v. Jerome*, *942 F.2d 1328, 1331 (9th Cir. 1991)*, held that a relationship involving mere customers is not sufficient to prove a managerial role.

A review of the facts of *Delgado* demonstrates that the factual similarities to this Petition merit reversal of the Third Circuit's decision. Mr. Delgado simply sold large amounts of cocaine to two buyers. The facts at trial failed to prove that Mr. Delgado was their sole source of supply, that those buyers worked for Mr. Delgado, or that he offered to pay legal counsel if any of them

were arrested. Furthermore, Mr. Delgado was not involved with the arrangements between those buyers and their customers, such as setting the prices at which the customers' sales were made, or receiving any of the markup when the buyers dealt with the customers directly. The Ninth Circuit held that Mr. Delgado never indirectly influenced, directed, organized, coordinated, or otherwise purposefully affected the buyers' drug-dealing activities.

Applying these facts to an 848 analysis, the Ninth Circuit Court rejected the government's chain link conspiracy analogy, noting that while such analogy may work well in a government agency where there is indeed a "chain of command", business is not always hierarchical, especially where "the buyers and sellers are not connected by steel "links", but instead operate independently of each other. 4 F.3d at 786. Thus, Mr. Delgado did not manage the buyers pursuant to 848. Rather, the evidence reflected a mere

buyer-seller relationship between Mr. Delgado and his wholesale customers which was insufficient to prove this element of the 848 offense and required reversal of Mr. Delgado's CCE conviction. *Id.* at 786-87.

The relationship in *Delgado* is akin to the relationship between the Petitioner and his co-defendants in this Petition. The evidence demonstrates that most of Mr. Brozyna's co-defendants, Dale Gregg, Edward Gregg, and Arthur Hanman were mere independant buyers. John Kaye's role was hardly discussed at trial. Bruce Gittleman was at best a partner, who arrived at the Bristol warehouse with his driver Arthur Hanman. Philip

D'Agostino was at best a landlord, who was apparently going to rent his premises to store marijuana. Significantly, Brozyna could only come up with small amounts of cash and had to rely on these buyers for all but $30,000 of the $800,000 that the DEA agents demanded. At most, Mr. Brozyna only acted as a broker, and his relationship to those individuals was akin to that in *Delgado* and the other cases cited above.

Additionally, the government's very own closing argument supports a *Delgado* argument. In closing the government reasoned that:

> 1. Bruce Gittleman role was similar to Brozyna who organized buyers and maintained a workhouse in New Jersey;
> 2. Dale and Edward Gregg were buyers of marijuana, who bought it for resale; and
> 3. D'Agostino had a "stash" house, which was available if necessary.

N.T. 3/15/88 at 7-8.

Regarding Mr. Brozyna, the government stated:

> Matthew Brozyna is the organizer. He is the one who knows all the people. He is the one who puts all the buyers together.

N.T. 3/15/85 p.7.

Immediately thereafter Bruce Gittleman is discussed:

> Defendant Gittleman was a similar type person who organized buyers and maintained a workhouse in New Jersey in which the marijuana was to be off-loaded.

Ibid.

The evidence at trial reflected that Bruce Gittleman was intimately involved in the reverse-sting as an independant purchaser, rather than an employee controlled by the Petitioner. Bruce Gittleman, with his driver Arthur Hanman, supplied $480,000 of the $800,000. In comparison, tne Petitioner could only supply $30,000. Additionally, Bruce Gittleman, not the Petitioner, counted the $480,000.00 Mr. Hanman brought and even directed the agents in weighing and moving the bales of marijuana. When Bruce Gittleman arrived at the Bristol warehouse with Arthur Hanman, the DEA agents asked Mr. Gittleman, not Mr. Brozyna, how much money he had, to which Mr. Gittleman, not Mr. Brozyna, responded $480,000.00. These facts illustrate Mr. Gittleman's pro-active role and proves that Mr. Brozyna did not control him. There was no evidence that he was anything other than an equal partner of the Petitioner, and the record is devoid of any proof that Matthew Brozyna controlled or managed Bruce Gittleman

pursuant to 848.

The actions of the Petitioner's other co-defendants further undermine the Third Circuit's decision. When Dale Gregg arrived at the Bristol warehouse, he cut into every bale and only selected the best quality marijuana. This selectivity demonstrates that Dale Gregg was not under the Petitioner's control. Delgado held that such independence mitigates against a determination that the Petitioner is an organizer under 848.

The alleged role of John Kaye is superficial at best. At trial, the government argued that John Kaye was a buyer. However, John Kaye was not present at trial, despite the D.E.A.'s vast resources, and **remains a fugitive to this day**. Mr. Kaye was not arrested at the Bristol Warehouse, nor was he scheduled to appear at that location. The basis for Mr. Kaye's inclusion in the 848 analysis is not founded upon information provided to the DEA agents by Matthew Brozyna, but rather other individuals. No evidence was produced at trial to establish any relationship between Mr. Kaye and the Petitioner, in fact, it is uncertain whether John Kaye even exists.

Finally, as to those participants that Matthew Brozyna acted in concert with and allegedly supervised, the prosecutor made the following remarks:

> The next element: There has to be five or more persons acting in concert with defendant. Well, you know about many of them. Many of them you do

> know about but do not know their identity. You do know about defendant Bruce Gittleman. You know about Dale Gregg. You know about Edward Gregg. You know about Philip D'Agostino. You know about the two workers down in the workhouse down in Florida
> who Special Agent Parsons met. You know about the buyer in Manhattan, New York, that has the warehouse. All of those individuals are much more than five people, so that element is established with no difficulty.

N.T. 3/15/88 at 42.

Considering these remarks the breakdown of the Petitioner's alleged network is as follows: Five buyers - Dale and Edward Gregg, Hanman, Kaye and an unknown New York buyer; Two workers (in Florida); One warehouser - D'Agostino; and one partner / independant contractor - Gittleman. However, each of these individuals acted independantly from the Petitioner. The absence of 848 control regarding the Greggs, Hanman is discussed previously. In regard to the unnamed New York buyer, no evidence was produced at trial establishing that this individual is a separate person. In fact, that New York buyer could have easily been Dale Gregg. The

Petitioner further contends that the government failed to establish that the Petitioner exerted 848 control over the two Miami workers. As established previously, the facts adduced at trial fail to demonstrate that at least five of these individuals were controlled by Matthew Brozyna pursuant to 21 U.S.C. § 848.

Applying the significant authority in *Delgado* and the other cases, the government failed to demonstrate that Mr. Brozyna controlled or managed these individuals. Mr. Brozyna was not the exclusive seller to these individuals, he did not set their prices and profit margins, and he did not tell them who to sell to. The buyers had other sources, and by implication the other sources had their own multiple sources. Accordingly, the evidence was insufficient to demonstrate that these customers were managed, supervised, or organized by him as to satisfy this requirement under 848.

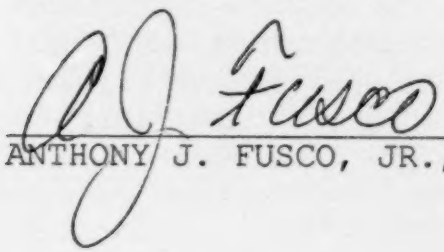
Despite these obvious insufficiency in the government's case, prior counsel failed to argue during trial or on direct appeal that this 848 element had not been satisfied. Even if trial strategy can account for this omission during trial, no such excuse is acceptable for the omission during direct appeal. This omission was objectively unreasonable. Comparing the applicable case law discussed previously, there is a reasonable probability that, but for the omission of an argument against the numerosity element of 848, Mr. Brozyna's conviction would have been set aside at the trial level or reversed at the appellate level. Therefore, this omission constituted ineffective

CONCLUSION

For all the foregoing reasons, the decision of the Third Circuit is in conflict with that of the Ninth Circuit and other Circuit Courts because the Petitioner's trial and direct appeal counsel committed ineffective assistance of counsel warranting reversal of the CCE conviction.

Respectfully submitted,

LAW OFFICES OF A.J. FUSCO, JR., P.A.



ANTHONY J. FUSCO, JR., ESQUIRE

Dated: November 5, 1998

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NOT FOR PUBLICATION

U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1326

UNITED STATES OF AMERICA
Appellee

v.

MATTHEW BROZYNA,
Appellant

Appeal from the United
States District Court
for the Eastern District of Pennsylvania
D.C.Crim.No.84-cr-00209-01)
District Judge: Honorable Thomas N. O'Neill,
Jr.

Submitted Pursuant to Third Circuit LAR 34.1
(a)
April 21, 1998
Before: STAPLETON, NYGAARD and WEIS, Circuit
Judges

Filed: April 29, 1998

MEMORANDUM OPINION OF
THE COURT

WEIS, Circuit Judge.

In 1985, petitioner Matthew Brozyna was convicted of a continuing criminal enterprise conspiracy, and other offenses related to possession and distribution of marijuana. He received a sentence of thirty years imprisonment to be followed by a term of probation. The judgment affirmed by this court. See United States v. Brozyna, No. 87-1436 (3d Cir. March 25, 1988) (unpublished).

In November 1995, Brozyna filed a petition under 28 U.S.C. S. 2255 raising a number of issues. The district court set aside the conspiracy sentence but otherwise denied the requests for relief.

On appeal to this court, petitioner contends that his former counsel rendered ineffective assistance in his direct appeal by failing to challenge the continuing criminal enterprise conviction for lack of numerosity. He also contends that, because he suffers from bipolar disorder, continuing incarceration amounts to cruel and unusual punishment prohibited by the Eighth Amendment.

In the brief on direct appeal, the petitioner's counsel stated, "Mr. Brozyna is charged....with being in a position of an organizer, supervising position, when, in fact, it appears quite clearly that the government agents themselves enticed Mr. Brozyna into such acts, and that they, the agents, organized the entire matter." The brief thus raised the issue of sufficiency of

the evidence, which included numerosity. This court rejected the argument that the "evidence was insufficient to sustain [his] conviction [ ]". In these circumstances, we cannot find that counsel's performance fell below the required standards.

Petitioner also contends that his prison sentence amounts to cruel and unusual punishment because his mental condition is deteriorating and has created a grave risk of suicide. Although he submitted evidence to support his contention, the district court was persuaded otherwise by a report from his case manager that petitioner was enrolled in educational courses at the prison and that his mental and physical health appeared to be normal. Moreover, to the extent he raises the issue, petitioner failed to prove that treatment facilities at the institution were inadequate to meet his needs. Thus, we cannot say, on this record, that the district court erred in rejection his Eighth Amendment claim.

Accordingly, the judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing Opinion.

/S/Joseph F. Weis, Jr.
U.S. Circuit Judge

Dated: April 29, 1998

U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1326

UNITED STATES OF AMERICA,
Appellee
v.
MATTHEW BROZYNA,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Before: STAPLETON, NYGAARD, and WEIS, Circuit Judges

JUDGMENT

This cause came on to be considered on the record from the U.S. District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1 (a) on April 21, 1998.

On consideration whereof, it is now ordered and adjudged by this Court that the judgment of the District Court entered March 26, 1997 be and the same is hereby affirmed.

ATTEST:

/s/P. Douglas Sisk
Clerk

Dated: April 29, 1998

IN THE U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

U.S. OF AMERICA	:	Criminal
	:	Action
v.	:	
	:	
MATTHEW BROZYNA	:	No.84-209

ORDER

AND NOW this 25th day of June, 1997, upon consideration of petitioner's section 2255 petition, it is hereby ORDERED that petitioner's motion is DENIED. Petitioner did not allege any change in the factual circumstances or in the law requiring reconsideration.

Petitioner also requests that this Court issue a certificate of appealability pursuant to Section 2253. Because there is no probable cause for appeal petitioner's request is DENIED.

/s/Thomas N. O'Neill,Jr.
THOMAS N. O'NEILL, JR.

IN THE U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

U.S. OF AMERICA	:	Criminal
	:	Action
v.	:	
	:	
MATTHEW BROZYNA	:	No.84-209

ORDER

AND NOW this 25th day of June, 1997, upon consideration of petitioner's objections to the Report and Recommendation of Magistrate Judge M. Faith Angell and the government's response thereto, it is hereby ORDERED that this Court's Order of November 7, 1996 approving and adopting Judge Angell's Report and Recommendation will not be vacated.

On November 7, 1996 this Court entered an Order approving and adopting the Report and Recommendation of Magistrate Judge Angell. On that same day petitioner filed objections to the Report and Recommendation which were not considered in my decision to approve and adopt the Report and Recommendation. I have now considered the objections along with the government's response thereto, and I find no basis for vacating the Order of November 7, 1996.

/s/Thomas N. O'Neill,Jr.
THOMAS N. O'NEILL, JR.

IN THE U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

U.S. OF AMERICA	:	Criminal
	:	Action
v.	:	
	:	
MATTHEW BROZYNA	:	No.84-209

ORDER

AND NOW this 25th day of June, 1997, upon consideration of the pleadings and the record herein, and after review of the Report and Recommendation of M. Faith Angell, United States Magistrate Judge, it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. Petitioner's Motion under 28 U.S.C. Sec. 2255 To Vacate, Set Aside, or Correct Sentence is GRANTED IN PART, DENIED AND DISMISSED IN PART, WITHOUT AN EVIDENTIARY HEARING.

3. The sentence imposed on July 15, 1987 on Count 1 (conspiracy) is VACATED.

4. The Sec. 2255 Motion is DENIED IN ALL OTHER RESPECTS.

BY THE COURT:
/s/Thomas N. O'Neill,Jr.
THOMAS N. O'NEILL, JR.